BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of	)	
	)	IB Docket No. 96-261
International Settlement Rates	)	
	)	

COMMENTS OF KOKUSAI DENSHIN DENWA CO. LTD.

February 7, 1997

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SUMMARY

Kokusai Denshin Denwa Co. Ltd. ("KDD") opposes the FCC's proposals to adopt mandatory settlement rate benchmarks governing the rates that foreign carriers may charge to terminate U.S.-billed traffic in their own countries. The FCC's unilateral approach is at best a half-solution to a global issue that will only exacerbate discriminatory settlement rate arrangements, causing harmful side-effects for certain carriers while bestowing windfall benefits upon others. KDD recommends that the FCC pursue accounting rate reform through the appropriate international forum, the International Telecommunications Union, and KDD is prepared to work actively and cooperatively to see that effort to a successful conclusion.

KDD respectfully submits that the FCC lacks jurisdiction to adopt its proposals under the Communications Act of 1934. While contending that it desires to regulate only U.S. carriers, the FCC concedes, as it must, that its proposals will not be successful unless they bind foreign carriers as well. Further, the FCC's argument that it may regulate the settlement rates charged by a foreign carrier because they could have an effect upon the collection rates paid by U.S. consumers proves too much. Even if the FCC's premise were correct, the FCC does not have statutory jurisdiction to regulate every aspect of the telecommunications industry in every country that may have an effect on the rates paid by U.S. consumers. The FCC's proposed policies would lead to harmful conflicts with foreign governments and place carriers in the untenable position of being subject to contradictory regulatory regimes. The only acceptable jurisdictional approach is that each country regulates the settlement rates charged by its own carriers for terminating foreign-billed international traffic in accordance with widely recognized and accepted criteria.

The FCC's proposals are contrary to the half-circuit theory of jurisdiction that the FCC has recognized and practiced for decades. Prescribing the settlement rates that foreign carriers may charge to terminate traffic in their own countries is an impermissible regulation of the foreign half-circuit. Further, the FCC has construed its own statutory jurisdiction to give it plenary and exclusive authority over all "interstate and foreign communication[s]" within the meaning of 47 U.S.C. § 152(a). Because the FCC cannot show, and does not even argue, that it has exclusive and plenary jurisdiction over the settlement rates and practices of foreign carriers for terminating U.S.-billed traffic in their own countries, the FCC's argument that it has statutory jurisdiction to prescribe settlement rates for foreign carriers falls of its own weight.

The FCC's stated concern about the size and growth of the U.S. net settlements imbalance is misplaced. The principal cause is not high settlement rates or the practices of foreign carriers, but the proliferation of U.S. reverse-billed and refile services in recent years. If U.S. and Japanese reverse-billed services were removed from the settlements process, and all international switched traffic were billed by the originating carrier, KDD estimates that the traffic imbalance on the U.S.-Japan route would decline by approximately 55%.

Further, it is impossible to evaluate the U.S. net settlements imbalance in a vacuum. Settlement payments are a cost of doing business that can be evaluated only in the context of the services they support and the revenues they produce. At least some of the U.S. carriers' reverse-billed services that have increased the U.S. net settlements imbalance are profitable services with rates higher than international direct dial rates, and the retained revenues of U.S. international carriers continue to grow yearly. Also, the FCC has forgotten to consider that, due to exchange rate fluctuations, increases in the U.S. net settlements imbalance do not translate into equivalent increases in the settlement payments being received by foreign carriers. That notional settlement rates have been steadily declining during the same time period when the U.S. net settlements imbalance has been steadily increasing shows that notional settlement rates are not responsible for the current U.S. net settlements imbalance.

Moreover, there is no evidence that the size or growth of the U.S. net settlements imbalance causes higher collection rates for U.S. consumers. Historical experience and empirical evidence suggest that there is no statistical relationship between settlement rate reductions and U.S. collection rates. For example, during the period from 1990-1995 when the settlement rate on the U.S.-Japan route declined by approximately 53%, AT&T direct-dial rates for calls to Japan increased by 13%. Further, to the extent a growing settlements imbalance is caused by profitable reverse-billed and refile services that are increasing the retained revenues of U.S. carriers, the impact, if any, upon U.S. collection rates should be positive, not negative. There is simply no historical or empirical basis to conclude that mandatory settlement rates will result in lower U.S. collection rates, and the U.S. net settlements imbalance is irrelevant from a policy perspective.

Further, while KDD fully supports establishing cost-oriented settlement rates worldwide, there is no global consensus today in support of the proposed TSLRIC/TCP approach. KDD would note that the Regional Group for Asia and Oceania (TAS), one of the regional ITU groups, has used the average cost methodology to derive recommended maximum settlement rates (Rec. D.500R) that vary from the FCC's proposed benchmark rates. Further, the FCC has conceded that it lacks the data necessary to prescribe cost-oriented rates, thereby removing any empirical basis for the FCC's proposals.

The FCC's proposal to categorize countries into three groups based upon World Bank classifications is empirically unsound. KDD disagrees that there is any necessary relationship between tariffed prices and a country's level of economic development. KDD would note that 50% of low-income countries and 63% of middle-income countries have a lower overall TCP than Japan, mainly due to foreign currency fluctuations. Further, there can be enormous variations in the cost sensitivities of countries within the same income category.

Similarly, the FCC's TCP approach ignores the extent to which some foreign currencies, like the Japanese yen, are demonstrably overvalued compared to the U.S. dollar. The inherent difficulty of taking purchasing power parity into account when calculating TCPs or benchmarks demonstrates the futility of the FCC's proposed effort to prescribe cost-oriented settlement rate benchmarks.

The FCC's finding that U.S. carriers incur fewer terminating costs than foreign carriers undermines the FCC's traditional policy requiring a 50/50 division of tolls. Yet the FCC did not acknowledge that U.S. carriers today receive non-cost based settlement rates for foreign-billed traffic according to the FCC's own perspective, or that the 50/50 policy creates a greater margin for U.S. carriers than foreign carriers under the same accounting rate.

KDD objects to the FCC's apparent intention that foreign carriers must present cost data to the FCC in order to justify an exemption from the FCC's proposed benchmarks. U.S. and foreign carriers should not have to defend their settlement rates in any country other than their own. Further, the FCC's proposed unilateral enforcement policies show the full extent to which the FCC is seeking to exert extraterritorial jurisdiction by imposing settlement rate benchmarks upon foreign carriers. The FCC should adopt guidelines, rather than mandatory benchmarks, to avoid unfortunate conflicts between U.S. and foreign carriers and their respective Government authorities.

The FCC's proposed mandatory benchmarks are contrary to the letter and spirit of governing international telecommunications regulations, which require that the rates and terms of operating relationships be established by "mutual agreement" and "mutual consent." The issue of global accounting rate reform is under active discussion within ITU-Study Group 3, which is the appropriate forum for addressing an inherently multilateral issue such as global accounting rate reform.

The FCC should not establish harmful new entry barriers by requiring foreign carriers to comply with settlement rate benchmarks as a condition of entering the U.S. market. Such conditions would not promote competitive conditions in the U.S. market, but would merely augment the already anticompetitive impact of the FCC's "effective competitive opportunities" or ECO policy. The FCC's proposals also would be contrary to the Most Favored Nation and National Treatment principles embodied in Articles 2 and 17 of the General Agreement on Trade in Services (GATS) because those proposals discriminate among countries without regard to costs and apply in a discriminatory manner to foreign as opposed to U.S. carriers.

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TO: The Commission

COMMENTS OF KOKUSAI DENSHIN DENWA CO. LTD.

Kokusai Denshin Denwa Co. Ltd. ("KDD"), by its attorneys, hereby submits these comments in response to the Notice of Proposed Rulemaking (FCC 96-484) released by the Commission in the above-captioned proceeding on December 19, 1996 [hereinafter "Notice"]. KDD is one of seven Type I facilities-based international carriers in Japan, and it is the largest provider of international switched services on the U.S.-Japan route.

KDD believes that it is well-positioned to offer informed commentary on the FCC's proposals because KDD, while a net recipient of settlement revenues on the U.S.-Japan route, is in the aggregate a net payor of settlement revenues. While KDD supports establishing cost-oriented settlement rates and moving towards a new system of remuneration, KDD opposes the FCC's accounting rate benchmark proposals because, as a unilateral response to multilateral issues, they are at best a half-solution that will exacerbate discriminatory settlement arrangements, causing harmful side-effects for certain carriers while bestowing windfall benefits upon others. Further, KDD opposes the proposals on the following grounds:

(i) the FCC lacks jurisdiction under the Communications Act of 1934 to adopt the proposals;

(ii) the FCC misapprehends the significance and causes of the U.S. net settlements imbalance;

(iii) the FCC should focus upon the increasing revenues of U.S. carriers rather than settlement rate levels;

(iv) the FCC has not supported imposing a methodology that is not generally accepted or recognized by other countries;

(v) the FCC's policies are inconsistent with truly cost-oriented settlement rates;

(vi) the FCC should not adopt policies requiring foreign carriers to produce data or appear before the FCC;

(vii) the FCC should not adopt unilateral enforcement policies which abrogate the contractual duties of U.S. carriers;

(viii) the FCC's proposals are contrary to international regulations and considerations of international comity;

(ix) all countries should address accounting rate reform through appropriate international fora;

(x) the FCC should not condition the Section 214 authorizations of foreign affiliated U.S. carriers upon compliance with the FCC's settlement rate benchmarks; and

(xi) the proposed settlement rate benchmarks would be contrary to GATS principles.

I. THE FCC LACKS JURISDICTION UNDER THE COMMUNICATIONS ACT OF 1934 TO ADOPT MANDATORY ACCOUNTING RATE BENCHMARKS

The FCC has asked parties to comment on whether it has the necessary authority to adopt mandatory accounting rate benchmarks. Notice at para. 19. KDD respectfully submits that the FCC does not have such authority under the Communications Act of 1934. In support of its suggestion of jurisdiction, the FCC argues that its proposed measures are "directed at U.S. carriers and the settlement rates they pay to foreign carriers." Id. However, the impact of the FCC's proposed measures would be felt just as directly by foreign carriers as by U.S. carriers. What U.S. carriers pay determines what foreign carriers receive, and it is not meaningful to speak of prescribing the former without recognizing that it is the functional equivalent of prescribing the latter.

The FCC's second rationale is that it has jurisdiction to prescribe accounting rate benchmarks because "the level of international settlement rates has an effect on the price paid by U.S. consumers for IMTS." Id. However, this rationale proves too much.[1] There are many factors which affect the collection rates paid by U.S. consumers where the FCC does not have jurisdiction to regulate. The FCC itself recognizes that competitive conditions and the stage of liberalization in foreign countries affect U.S. collection rates (e.g., Notice at para. 20), but surely the FCC does not suggest that it has jurisdiction to regulate liberalization and competition in foreign countries in an effort to produce lower collection rates for U.S. consumers. A nexus with U.S. collection rates is necessary but not sufficient to give the FCC jurisdiction to adopt regulations. The FCC also must establish that it has sovereign or territorial jurisdiction over the subject matter in question, and KDD respectfully submits that the FCC does not have such jurisdiction over the rates charged by foreign carriers to terminate U.S.-billed international switched traffic in their own countries.

It is KDD's view that each country has the authority to regulate the rates charged by carriers operating under its jurisdiction for the termination of traffic originating in other countries in a globally acceptable manner. Therefore, the FCC has authority to regulate the settlement rates that U.S. carriers charge foreign carriers to terminate international switched

[1] Also, the FCC has produced no evidence that lower settlement rates will result in lower collection rates for U.S. consumers. The only way to ensure that settlement rate reductions will be passed through to U.S. consumers is by affirmatively requiring U.S. carriers to do so.

traffic in the United States. However, the FCC does not have jurisdiction to tell other countries what settlement rates their carriers may charge for terminating U.S.-originating traffic, just as foreign regulatory authorities lack jurisdiction to tell U.S. carriers what settlement rates they may charge for terminating foreign-billed traffic. The validity of this approach is affirmed by the FCC's acknowledged difficulty in developing a record basis for deriving cost-based settlement rates for foreign carriers. The FCC openly concedes that it lacks the data necessary to prescribe what the FCC would regard as cost-based settlement rates for the termination of U.S.-originating traffic by foreign carriers in their own countries. Notice at paras. 33, 50 & 55. Nor does the FCC dispute that it lacks the authority to compel foreign carriers to produce the necessary cost data for such a prescription. The FCC's lack of jurisdiction to compel the production of necessary cost data confirms the FCC's lack of jurisdiction to tell foreign carriers what they will charge to terminate U.S.-originating traffic.

The FCC's proposed assertion of jurisdiction would lead to direct conflicts with foreign Government authorities and place foreign carriers in the untenable position of being subject to conflicting regulatory mandates. The FCC's approach would effectively preclude any Government authority other than itself from prescribing settlement rates for terminating U.S.-originating traffic in foreign countries. What would happen if a foreign country prescribed settlement rates that are higher than the FCC's proposed rates? What would happen if that foreign country affirmatively prohibited its carriers from agreeing to settlement or termination rates that are lower than its own prescribed rates? Because there is not room enough for more than one country on a route to prescribe mandatory settlement rates that carriers will charge to terminate foreign-billed traffic, the basic regime must be that each country regulates the settlement rates charged by its own carriers for terminating foreign-originating international switched traffic in accordance with widely recognized and accepted criteria.[2]

The FCC's historic view of its jurisdiction over international communications services supports KDD's view that each country has exclusive jurisdiction to prescribe the rates that its own carriers charge to terminate foreign-billed traffic in their own country, taking into account relevant international standards. For years, the FCC has publicly adhered to the half-circuit theory of jurisdiction for international switched services whereby the FCC's jurisdiction reaches only to the "theoretical midpoint" between the United States and a foreign country. This theory is reflected in the FCC's manual for filing revenue and traffic reports, which states that "[t]he international portion of the service typically begins at a point within the United States, and terminates at a connection point halfway between the U.S. and the destination country."[3] Further, the FCC's grant of Section 214 authority to U.S. carriers for international switched services is limited to the U.S. half-circuit.[4] The FCC has directly or implicitly endorsed the half-circuit theory of jurisdiction in several other cases.[5]

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[2] Of course, another possible alternative would be for the FCC, as it previously did in CC Docket No. 90-337, to establish settlement rate benchmarks as mere guidelines for U.S. and foreign carriers. See Regulation of International Accounting Rates, 7 FCC Rcd 8040, 8041 (1992). It is the adoption of mandatory benchmarks that establishes an inherent jurisdictional conflict between the United States and foreign countries.

[3] See "Manual for Filing Section 43.61 Data," FCC Report 43.61 (June 1995) at p. 11.

[4] See 47 C.F.R. § 63.18(e)(i)(B); Streamlining the International Section 214 Authorization Process and Tariff Requirements, 11 FCC Rcd 12884, 12892 (1996); id., 3 Comm. Reg. 1233, 1234 (1996).

[5] E.g., AT&T Co., 98 FCC 2d 440, 462 (1984) (statement that FCC's jurisdiction stops at the "theoretical midpoint" between the U.S. and the foreign country); Regulation of International Communications Carrier Services, 7 FCC Rcd 7331, 7335 n.66 (1992) ("our jurisdiction flows to the U.S. carrier, not to its foreign affiliate");

By seeking to prescribe the rates that foreign carriers will charge to terminate U.S.-originating traffic in their own countries, the FCC has acted contrary to the half-circuit theory of jurisdiction which it has applied for decades.

The FCC's own interpretation of the scope of its jurisdiction under the Communications Act confirms the half-circuit theory of jurisdiction and contradicts the FCC's proposals to prescribe the rates that foreign carriers may charge to terminate U.S.-originating traffic in their own countries. It is well-established that, to the extent the FCC has jurisdiction over "interstate and foreign communication[s]" under Section 2(a) of the Communications Act, such jurisdiction is plenary and exclusive unless the statute provides otherwise.[6] Nowhere does the Communications Act recognize shared jurisdiction with foreign Government authorities over "interstate and foreign communication[s]," as those terms are used in Section 2(a). Therefore, the FCC's assertion that it has jurisdiction to prescribe the settlement rates that foreign carriers charge to terminate traffic in their own country is erroneous unless the FCC can show that it has plenary and exclusive jurisdiction over the settlement rates and practices of foreign carriers. Because the FCC does not assert, and could not plausibly assert, plenary and exclusive jurisdiction over the settlement rates and practices of foreign carriers in their own countries, the FCC's assertion of jurisdiction to

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Cable and Wireless Communications, Inc., 2 FCC Rcd 1186, 1187 (1987) (Common Carrier Bureau) (recognizing that the FCC lacks jurisdiction over a foreign carrier's activities in its home country).

[6] 47 U.S.C. § 152(a); IT&E Overseas, Inc., 7 FCC Rcd 4023, 4024 & n.15 (1992); Operator Services Providers of America, 6 FCC Rcd 4475, 4476 (1991); Midwest Corp., 38 FCC 2d 897, 898 (1973).

prescribe mandatory settlement rates for foreign carriers is contrary to the jurisdictional scheme embodied in the Communications Act.

Lastly, as regards the jurisdictional scope of the Communications Act, there is a presumption that Congress intends for legislation to apply solely within the territory of the United States.[7] That presumption is necessary to remove the risk of "outright collisions between domestic and foreign law" which would arise when a federal agency seeks to apply a U.S. statute extraterritorially.[8] It is the responsibility of Congress, not federal agencies like the FCC, to make such important policy choices.[9] Therefore, absent legislative history or statutory language authorizing the FCC to exercise extraterritorial jurisdiction, the FCC does not have authority to prescribe settlement rates for foreign carriers to charge when terminating U.S.-originating traffic in their own countries.

II. THE FCC MISAPPREHENDS THE SIGNIFICANCE AND CAUSES OF THE U.S. NET SETTLEMENTS IMBALANCE

The FCC estimates that U.S. carriers paid roughly $5 billion in net settlement revenues to foreign carriers in 1995, a figure which it believes is unreasonably inflated by above-cost settlement rates. Notice at para. 8. Apparently by comparing its proposed benchmark rates to the notional settlement rates between U.S. and foreign carriers, the FCC estimates that approximately 75% of these payments represent a "subsidy" to foreign

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[7] E.g., Foley Brothers v. Filardo, 336 U.S. 281, 285-86 (1949); Independent Union of Flight Attendants v. Pan American World Airways, Inc., 923 F.2d 678, 680 (9th Cir. 1991); CFTC v. Nahas, 738 F.2d 487, 493 (D.C. Cir. 1984).

[8] See Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 557 (7th Cir. 1985).

[9] E.g., Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).

carriers. Id. KDD submits that the FCC has fundamentally misapprehended the significance and causes of the U.S. net settlements imbalance.

For years the U.S. net settlements imbalance has been increasing even though, as FCC statistics show, notional settlement rates have been declining. In KDD's view, the principal reason for the increase in the U.S. net settlements imbalance is the steady growth in the imbalance between U.S.-billed and foreign-billed traffic on many routes, including the U.S.-Japan route. Based upon FCC statistics, the percentage of U.S.-originating and terminating traffic that is U.S.-billed is approximately 70% and trending upwards.[10] In KDD's view, the chief cause of the widening gap between U.S.-billed and foreign-billed traffic is the introduction of numerous reverse-billed services by U.S. carriers, including home country direct, home country beyond, international free-phone, and callback. While KDD and other foreign carriers have now begun to introduce their own reverse-billed services, the reverse-billed traffic of U.S. carriers on most routes is much larger in both absolute terms and as a percentage of total traffic volume. Based upon 1995 data, KDD estimates that net U.S. reverse-billed traffic represents nearly 28% of the traffic imbalance on the U.S.-Japan route.[11] Assuming that the originating carriers would bill all reverse-billed traffic in the absence of Japanese and U.S. reverse-billed services, KDD estimates that the traffic imbalance on the U.S.-Japan route would be reduced by approximately 55% in the absence of reverse-billed services. Therefore, the size of the U.S. net settlements imbalance,

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[10] See "Trends In The International Telecommunications Industry," Industry Analysis Division, FCC (Aug. 1996) at Table 4 [hereinafter "International Trends Report].

[11] To calculate net U.S. reverse-billed traffic, KDD subtracted Japanese reverse-billed minutes from the reverse-billed minutes of the U.S. carriers.

and certainly the growth in that imbalance over recent years, is largely attributable to the reverse-billed services offered by U.S. carriers, not to the settlement rate arrangements or other practices of foreign carriers.

The recent surge in reverse-billed minutes underscores the policy irrelevance of the U.S. net settlements imbalance. Net settlement payments are a cost of doing business for U.S. carriers. It is impossible to evaluate those costs without also considering the revenues they produce. Presumably, U.S. carriers have stepped up their reverse-billed service offerings in recent years because collection revenues more than compensate U.S. carriers for any increase in net settlement outpayments. Indeed, home country direct and home country beyond services are premium services with rates higher than the international direct dial rates of either U.S. or Japanese carriers, thereby ensuring significant profit margins for U.S. carriers. While it is true that these services would be even more profitable for U.S. carriers if settlement rates dropped further, it is impossible to draw any relevant policy conclusions from the size or growth trend of the U.S. net settlements imbalance.[12]

Further, there is no empirical or logical basis to conclude that the U.S. net settlements imbalance has a negative impact upon collection rates paid by U.S. consumers. Several studies have failed to identify any significant correlation between accounting rate

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[12] KDD cannot estimate with precision the percentage of U.S. reverse-billed calls that would have been originated and billed by Japanese carriers in the absence of the U.S. carriers' reverse-billed services. However, given that U.S. carriers market their reverse-billed services aggressively to customer groups with an established need for and history of placing calls from Japan to the United States (e.g., military bases, high-volume customers with locations in both countries), KDD believes that Japanese carriers would have originated and billed a significant percentage of reverse-billed calls in the absence of the U.S. carriers' reverse-billed service offerings.

levels and collection rate levels.[13] During the period from 1990-1995 when the settlement rate on the U.S.-Japan route decreased by approximately 53%, AT&T's direct-dial rates for a seven-minute call to Japan increased by 13%.[14] Indeed, to the extent the growth in the U.S. net settlements imbalance reflects the success of profitable reverse-billed services, the growth in the settlements imbalance could reflect increased revenues which U.S. carriers could apply to reduce U.S. collection rates if they so desired.[15] In addition, there is no reason why any increase in the U.S. net settlements imbalance caused by home country direct and home country beyond services should have a negative impact upon the collection rates paid by U.S. consumers for international message telephone service ("IMTS"). Those premium services deliver a discrete, identifiable traffic stream to the U.S. carriers, and any settlement cost increase attributable to them can be reflected in the premium rates charged by U.S. carriers to users of those services. In sum, it would be speculation for the FCC to

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[13] E.g., Kenneth B. Stanley, "Balance of Payments, Deficits, and Subsidies in International Communications Services: A New Challenge to Regulation," 43 Administrative Law Review 411, 426, 427 (Summer, 1991) (concluding that there is "no apparent relationship between [IMTS] prices and [accounting] rates" and that "there is little correlation between the reductions in [IMTS] prices and accounting rates").

[14] See International Trends Report at Table 11.

[15] FCC statistics show a steady increase in retained revenues for U.S. carriers during the same time period when the U.S. net settlements imbalance has been increasing. See International Trends Report at Tables 3-4. Further, the FCC has noted that decreases in the U.S. net settlements imbalance can harm U.S. consumers when they are accompanied by a net loss of revenues to U.S. carriers. See Regulation of International Accounting Rates, 7 FCC Rcd 559, 561 (1991). The converse also is true: increases in the imbalance can benefit U.S. consumers when they are accompanied by a net increase in the revenues of U.S. carriers.

conclude that the U.S. net settlements imbalance has a negative impact upon U.S. collection rates.

Lastly, the FCC ignores the extent to which exchange rate fluctuations can have a negative impact upon the value of the net settlements payments received by foreign carriers. For example, on the U.S.-Japan route, the yen-to-dollar exchange rate dropped from an average of 139 during 1989 to 95.1 during 1995. As a result, even though U.S. net settlement payments rose in U.S. dollars by 55% during that period, the payments received by Japanese carriers increased only 6% measured in Japanese yen. Therefore, growth in the U.S. net settlements imbalance does not necessarily mean that foreign carriers are receiving the full extent of that growth, or indeed any additional money at all, when measured in their own currencies.

III. THE FCC SHOULD FOCUS UPON THE INCREASING REVENUE OF U.S. CARRIERS

The U.S. net settlements imbalance cannot reasonably be a focal point of this proceeding. Whether the amount is large or small, it cannot be evaluated except in the context of the revenues that such costs are producing for U.S. carriers. The increasing U.S. net settlements imbalance simply reflects the increase in U.S.-billed traffic as a percentage of total U.S.-originating and terminating traffic. Rather, the FCC's evaluation of settlement rates should be limited to ensuring that U.S. carriers are compensated for the costs of terminating foreign-billed traffic. According to the FCC's own statistics, the time period when the U.S. net settlements imbalance has been increasing is the same time period when the retained revenues of U.S. carriers for international switched services have been steadily increasing. Moreover, notional settlement rates have been steadily declining while the retained revenues of U.S. carriers have been increasing,[16] both without any apparent positive impact upon U.S. collection rates.[17] The U.S. net settlements imbalance is simply irrelevant from a policy perspective, and the FCC's benchmark proposals will not promote the FCC's stated objective of benefiting U.S. consumers.

IV. THE FCC HAS NOT SUPPORTED IMPOSING A METHODOLOGY THAT IS NOT ACCEPTED OR RECOGNIZED BY OTHER COUNTRIES

The Notice (at paras. 31-32) proposes to adopt mandatory settlement rates based upon the Total Service Long Run Incremental Cost ("TSLRIC") and the tariffed component prices ("TCP") approach. The FCC proposed using the TCP approach because it admittedly lacks the data necessary to implement the TSLRIC methodology. Id. at paras. 35-38 & App. E. Furthermore, using those proxies, the FCC proposes to adopt separate benchmarks for three categories of countries based upon the level of economic development according to World Bank classifications, despite the absence of any direct linkage between those classifications and terminating costs in foreign countries. Although KDD fully supports establishing cost-oriented settlement rates and moving towards a new remunerative system, KDD opposes the FCC's proposed unilateral approach to developing cost-oriented settlement rate benchmarks. In particular, KDD believes that there may be more than one methodology by which to calculate "cost-oriented" international settlement rates. Certainly, there is no global consensus today in support of the TSLRIC methodology or the TCP approach. For example,

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[16] See footnote 15 supra.

[17] See pages 9-10 supra.

the Regional Group for Asia and Oceania (TAS), one of the regional groups within the ITU framework, has used the average cost methodology in its cost model to derive recommended maximum settlement rates (Rec. D.500R). The shared perspective of more than 50 countries in Asia and Oceania is far more relevant than the TCP approach.[18]

Further, the FCC based its TCP proposal upon ITU-T Rec. D.140, yet the ITU-T has not expressly or implicitly endorsed the TSLRIC/TCP approach. Rather than imposing a methodology on a global basis through the prescription of mandatory settlement rate benchmarks, the FCC should work towards a multilateral solution under the aegis of ITU-T Study Group 3.

A. Lack Of Cost Data.

Even if TSLRIC were the only methodology for deriving cost-oriented settlement rates, the FCC, by its own admission, lacks the data necessary to implement that methodology. The Notice (at para. 33) candidly recognizes that

> "[w]e do not have, and cannot obtain, the data necessary to calculate [TSLRIC] costs for each foreign carrier. We do not have convincing and up-to-date studies of foreign carriers' costs, nor do we believe that current and reliable data on such costs exists in most countries."

[18] The recommended maximum accounting rate is 0.41 SDR/minute for routes with a distance of 1-3000 km; 0.48 SDR/minute for routes with a distance of 3001-6000 km; and 0.51 SDR/minute for routes with a distance over 6000 km. KDD has attached a copy of the most recent recommendations and the underlying methodology as Attachment A.

Further, the International Bureau acknowledged that "[u]seful information needed to develop reliable cost estimates for terminating international service is still largely unavailable to the public."[19]

Once the FCC determined that it lacked the data necessary to apply the TSLRIC methodology, its inquiry should have been at an end. While the TCP approach may be the only substitute approach for which some global data are available, this does not make the TCP approach an accurate, reliable or conservative proxy for estimating "cost-oriented" rates. The FCC cannot lawfully impose settlement rate benchmarks on a global basis when it admittedly lacks the data necessary to implement its own chosen methodology. In any event, before considering whether to impose the TCP approach upon the world, the FCC should conduct the TCP analysis for the United States.

B. Income Categories.

The FCC asked for comment (Notice at para. 43) on its proposal to categorize countries according to the World Bank classifications for low-income, middle-income and high-income countries. The FCC proposed to use those classifications based on its assumption that "there generally is an inverse correlation between the level of tariffed components prices and a country's level of economic development." Id. KDD opposes the proposed use of the World Bank classifications. The case of Japan provides an apt illustration. Even though the World Bank classifies Japan as a high-income country, the

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[19] See "Foreign Tariffed Components Prices," A Report Prepared by the International Bureau, Telecommunications Division, FCC (Dec. 1996) at p. 1 [hereinafter "TCP Report"]. There the FCC also recognized the "absence of the cost data needed to perform such a [TSLRIC] study." Id.

FCC's TCP study produces results showing that 50% of low-income countries and 63% of middle-income countries have lower costs than Japan, mainly due to the fluctuations of foreign currencies. In fact, whatever relationship may exist between the World Bank classifications and the relevant cost experience of any country is so tenuous as to be virtually meaningless.

In addition, the FCC's assumption that all carriers within an income category have similar cost structures and levels is incorrect. For example, both the United States and Japan are in the high-income category, yet the cost of living is significantly higher in Japan than in the United States. The United Nations has compiled statistics showing that the cost of living in Japan is 82% higher than in the United States.[20] Similarly, the U.S. Department of State has prepared statistics showing that the cost of living in Japan (excluding housing and education) can be more than 136% more expensive than the cost of living in the United States.[21] Therefore, even were the FCC correct that there are meaningful differences from one income category to another, the differences among countries included in the high-income

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[20] See Monthly Bulletin of Statistics, Statistical Division, United Nations, No. 12, Dec., 1995, Special Table H ("Retail Price Indexes Relating to Living Expenditures of United Nations Officials"). Those statistics reflect a comparison of Tokyo and New York City for September, 1995. Using the cost of living in New York City as a base of 100, the study estimated that the cost of living in Tokyo rated 182. Excluding housing, the cost of living in Tokyo rated 158 compared to New York City.

[21] See "U.S. Department of State Indexes of Living Costs Abroad, Quarters Allowances, and Hardship Differentials -- July 1996," Department of State Publication 10197, Bureau of Administration, Offices of Allowances, at Table 1. Using the cost of living in Washington, D.C. as a base of 100, the Department of State estimated that the cost of living in various Japanese cities ranged from a low of 172 on Okinawa to a high of 236 for Tokyo.

category are so significant as to rebut any facile assumptions that such countries incur similar costs in terminating U.S.-billed switched traffic.

C. Purchasing Power Parity.

The FCC's TCP methodology ignores the extent to which some foreign currencies, like the Japanese yen, are demonstrably overvalued compared to the U.S. dollar. Due to this phenomenon, the current settlement rate on the U.S.-Japan route of .315 SDR/minute translates into roughly $0.48/minute for U.S. carriers but represents less than $0.48/minute in purchasing power for Japanese carriers. Therefore, U.S. carriers would have to pay more than the actual costs of Japanese carriers as measured in U.S. dollars to compensate Japanese carriers for the costs they incur in Japanese yen to terminate U.S.-originating traffic.[22] KDD does not propose that the FCC attempt to take purchasing power parity into account when calculating TCPs or benchmarks; rather, KDD submits that the inherent difficulty of translating foreign costs into U.S. dollars on an accurate and consistent basis should preempt any effort to prescribe settlement rates for foreign carriers through a TCP approach.

V. THE FCC'S PROPOSED POLICIES ARE INCONSISTENT WITH A REGIME OF COST-ORIENTED SETTLEMENT RATES

For years the FCC has required as part of its International Settlements Policy that U.S. carriers adhere to a 50/50 division of tolls unless they obtain a waiver permitting a non-50/50 split.[23] Based upon data supplied by AT&T but not placed on the record, the Notice

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[22] For example, the International Comparison Programme estimated in 1993 that the dollar-to-yen ratio in terms of purchasing power parity was 1:184, while the foreign exchange rate was 1:111.

[23] E.g., Regulation of International Accounting Rates, CC Docket No. 90-337, rel. Dec. 3, 1996, at para. 6 (Fourth Report and Order).

(at paras. 51-52) concluded that U.S. carriers incur substantially lower costs than their foreign correspondents to terminate international switched traffic.[24] In particular, the FCC estimated that the termination costs of U.S. carriers are less than $.06/minute, while foreign carriers incur incremental termination costs in the range of $.09/minute.

The FCC's estimates of the incremental terminating costs incurred by U.S. or foreign carriers cannot be regarded as reliable without detailed cost data. The FCC provides no cost or logical support for its estimate of $0.09/minute as incremental terminating costs for foreign carriers. Nor does the FCC provide data or analysis to support its estimate of $0.06/minute as the incremental terminating costs of AT&T. AT&T failed to provide detailed record data to support its own estimate of $0.075/minute. While KDD does not agree with the FCC's estimate of foreign carriers' incremental costs, KDD agrees that U.S. carriers incur substantially fewer termination costs than foreign carriers. As a result, the FCC's 50/50 policy has provided non-cost based benefits to U.S. carriers for many years in a manner that is inconsistent with ITU-T Recommendation D.140, which requires cost-oriented accounting rates and accounting rate shares. The FCC in the Notice did not acknowledge that U.S. carriers today receive non-cost based settlement rates for foreign-billed traffic according to the FCC's own perspective, or that the 50/50 policy has created a greater margin for U.S. carriers than foreign carriers under the same accounting rate. It should be noted that the non-50/50 apportionment is fully consistent with ITU-T Recs. D.150 and D.155.

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[24] KDD requests that the FCC disclose the AT&T data on the record in a way that permits interested parties to examine such record and submit comments thereon to the FCC in this proceeding.

If the FCC is serious about implementing cost-oriented settlement rates, the FCC must take immediate action to rectify the non-cost based margins the U.S. carriers have received pursuant to the non-cost based 50/50 policy. First, the FCC must repeal the policy immediately. Second, the FCC should initiate a new proceeding to determine what policy, if any, it should adopt in place of the historic 50/50 policy. If the FCC persists in pursuing unilateral actions to ensure what it believes to be cost-oriented settlement rates, then logically it must repeal the policy requiring a 50/50 division of tolls.

VI. THE FCC SHOULD NOT ADOPT POLICIES REQUIRING FOREIGN CARRIERS TO PRODUCE DATA OR APPEAR BEFORE THE FCC

The Notice states (at para. 57) that the FCC is prepared to permit a foreign carrier to deviate from mandatory settlement rate benchmarks if such carrier can "demonstrate that its costs are higher than the established benchmark." While KDD agrees that the FCC should permit exceptions to any benchmark policies it adopts, KDD strongly opposes the FCC's apparent intention that foreign carriers would have to submit cost data to the FCC or otherwise appear before the FCC in order to qualify for such an exception. It is untenable to suggest that foreign carriers should be made to appear before the FCC regarding the settlement rates they charge in their own countries, just as U.S. carriers should not be hauled in front of numerous foreign regulatory authorities to justify the settlement rates they charge to terminate traffic in the United States. If every country in the world were to require operators in other countries to appear before its regulatory authorities, the international telecommunications industry would quickly become bogged down in expensive, time-